



permanent aggravation of her underlying low back condition. Claimant has appealed this Award urging the Board to reverse the SALJ's finding and grant her a functional impairment<sup>1</sup> based upon the evidence contained within the record. Respondent contends the SALJ's Award should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the SALJ's Award should be affirmed.

The Board finds that the SALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and well-supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, the Board adopts the SALJ's findings and conclusions as its own as if specifically set forth herein.

The only issue to be decided in this appeal is the nature and extent of claimant's impairment attributable to her December 6, 2002 accident. Claimant acknowledges that she has a history of low back complaints which she was able to manage and treat with conservative measures. However, she maintains that her condition undeniably and permanently worsened following her December 6, 2002 injury, as evidenced by the testimony of Dr. Pedro Murati, and as a result, claimant has undergone several fusions and now suffers from failed back syndrome coupled with a loss of bladder control and "drop foot".

According to Dr. Murati, who has seen claimant on two separate occasions, claimant bears a 21 percent<sup>2</sup> permanent partial impairment which he finds is attributable to her December 6, 2002 accident. He testified that in addition to the two fusions to claimant's spine, she is suffering from failed back syndrome.

It seems that while Dr. Murati was aware of claimant's previous history of low back complaints, he did not have a clear picture of the extent of those complaints. For example, when claimant saw Dr. Murati the first time (on November 15, 2005) she failed to tell him

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<sup>1</sup> According to this record, claimant has continued to work in a modified position and is seeking only a functional impairment at this time. All ratings mentioned in this Order are to the whole body and were issued pursuant to the 4<sup>th</sup> edition of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment (Guides)*.

<sup>2</sup> Claimant's total permanent impairment is, according to Dr. Murati, 25 percent, based upon DRE V of the *Guides*. However, he testified that claimant had a 5 percent preexisting permanent impairment to the low back which must be deducted from the 25 percent impairment. And when deducted under the appropriate chart from the *Guides*, the net result is 21 percent.

of her September 2002 visit to the emergency room where she was complaining about low back pain along with radiating pain in the leg. The emergency room records from that visit reveal that claimant had ongoing complaints dating back 2 years to an earlier fall but also reference a more recent *re-injury* in July 2001. The records suggest a suspected herniated disk. In fact, claimant sought out treatment from her primary physician just 3 days before her work-related accident, telling her doctor that her back had “been bothering her quite a bit lately”.<sup>3</sup> She asked for and received a refill on her pain medications and indicated that her insurance would be effective in January 2003 “*and would like to pursue at that time going to an orthopaedic doctor about possibly some back surgery*”.<sup>4</sup> (emphasis added)

But Dr. Murati was not told of this September 2002 ER visit. Rather, his records indicate claimant told him of her previous low back pain “but it was tolerable with pain medications and chiropractic therapy.”<sup>5</sup> And while she did disclose her previous treatment with Dr. Poole on July 27, 2001, she told Dr. Murati that her back pain “was tolerable until the day she fell on 12-6-02.”<sup>6</sup> Other than assigning a 5 percent preexisting impairment, Dr. Murati put little emphasis on claimant’s previous history of low back complaints. Rather, he felt that her symptoms were significantly worse following her accident and that the 21 percent impairment was directly attributable to her December 6, 2002 accident.

Respondent contends that while claimant had a compensable injury, she returned to her pre-injury stable state as of January 28, 2003. And based upon the opinions of Drs. John McMaster and Dr. Bernard Poole, sustained no permanent impairment as a result of her injury. According to Dr. McMaster claimant sustained nothing more than a temporary aggravation and returned to her pre-accident status as of January 28, 2003.

Both Drs. Poole and McMaster concluded that claimant suffers from failed back syndrome and both physicians agree that claimant’s present complaints relate to her previous injury or condition and that there is no physical change in her anatomical structure that is attributable to her work-related accident. According to Dr. McMaster, there are no objective findings on claimant’s x-rays and her pre- and post-injury MRI’s are similar. He goes on to state that her symptoms are age related.<sup>7</sup>

Claimant was also examined by Dr. Paul Stein in August of 2003. At her original visit, claimant disclosed her earlier back problems, and her treatment with Dr. Poole in

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<sup>3</sup> McDonald Depo., Ex. 1 at 2 (Dec. 3, 2002 Office Note from Dr. Victoria Moots’ physician assistant).

<sup>4</sup> *Id.*

<sup>5</sup> Murati Depo. (May 30, 2006), Ex. 2 at 2 (Murati’s IME report dated Nov. 14, 2005).

<sup>6</sup> *Id.*

<sup>7</sup> McMaster Depo. at 19.

2001 but failed to disclose her chiropractic treatment, which included 25 visits with Dr. Steven DuCharme (beginning in July 2001) and for what Dr. DuCharme described as “acute lumbar disc” problems.<sup>8</sup> Dr. Stein treated claimant for a time with epidurals and following a discogram, claimant was referred for surgery.

Just before his deposition, Dr. Stein was provided with claimant’s hospital and chiropractic records which predated her work-related accident, along with additional records that he did not have before, including those from Dr. McMaster. Following his review of those records, Dr. Stein testified that he did not believe he had an accurate picture of claimant’s pre-accident condition or the extent of her pre-existing condition. He was then asked:

Q: Given your review of the records and based on your evaluation and treatment of her, are you able to identify any objective evidence of a permanent injury that was caused by the alleged event of December 6, 2002?

A: I think the key word there would be “objective”. Her imaging studies, MRI and discogram, were degenerative changes, so those would be pre-existing. If they were asymptomatic before, that would be one thing, but they were clearly symptomatic before because she had considerable amount of treatment. Whether, though, the incident in December at work on the ice aggravated those symptoms, that I can’t tell you. I don’t think they caused a structural change in her lower back. I don’t think they changed the pathology significantly. Whether she had more discomfort for a period of time, nobody can ever measure.

Q: Okay. And as we’re sitting here today, can you state within a reasonable degree of medical probability that she sustained a permanent injury on December 6<sup>th</sup>, 2002, in the alleged accidental injury?

A: No, I can’t.<sup>9</sup>

After considering the evidence contained in the record, the SALJ made the following findings and conclusions:

Based upon the [c]laimant’s pre-existing history of back problems, her desire to consult an orthopedic surgeon prior to the date of the accident for possible surgery and the testimonies of Dr. Poole, an orthopedic surgeon, Dr. Stein, a board certified neurosurgeon, and Dr. McMaster, that [c]laimant did not experience any lesion or change in the physical structure of her body, nor was there any permanent aggravation of her underlying condition, the Court concludes the [c]laimant has

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<sup>8</sup> Sasina Depo., Ex. 1 at 4-5.

<sup>9</sup> Stein Depo. at 14-15.

failed to sustain her burden of proof as required by K.S.A. 44-501(a) and K.S.A. 44-508(g).<sup>10</sup>

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>11</sup> “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>12</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>13</sup>

It is clear the SALJ was not persuaded by Dr. Murati’s opinions, instead relying upon the opinions of Drs. Stein, McMaster and Poole. And after considering the parties’ arguments, their briefs and the record as a whole, the Board finds the SALJ’s finding should be affirmed. Although claimant describes her pre-injury condition as “manageable”, the record belies that assertion. Claimant had significant symptoms in her low back and leg that waxed and waned over the 2 years before her work-related injury. She sought out care for those complaints from her private physician, a chiropractor, and an orthopedist. She clearly had an accident on December 6, 2002 but the greater weight of the evidence is that she sustained no structural change or permanent damage or impairment as a result of that accident. Like the SALJ, this Board does not believe that claimant met her burden of establishing that she sustained a permanent aggravation and resulting impairment as a result of her accident. Accordingly, the SALJ’s Award is affirmed.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge John C. Nodgaard dated February 4, 2010, is affirmed.

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<sup>10</sup> ALJ Award (Feb. 4, 2010) at 8.

<sup>11</sup> K.S.A. 44-501(a).

<sup>12</sup> K.S.A. 44-508(g).

<sup>13</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant  
William L. Townsley, Attorney for Respondent and its Insurance Carrier  
John C. Nodgaard, Special Administrative Law Judge  
Nelsonna Potts Barnes, Administrative Law Judge